

APPEAL NO. 002469

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 3, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury in the form of an occupational disease or have disability as there was no compensable injury; that the date of the claimed injury was _____; that the respondent/cross-appellant (carrier) was not relieved of liability under Tex. Labor Code Ann. § 409.002 because of the claimant's failure to timely notify the employer pursuant to Tex. Labor Code Ann. § 409.001; and, that the claimant was not barred from pursuing workers' compensation remedies due to an election to receive group health insurance or other benefits.

The claimant appealed the adverse determination that he had not sustained a compensable injury or disability on the grounds of sufficiency of the evidence. The carrier filed a response urging that the evidence was sufficient to support the determinations of the hearing officer and should be affirmed subject to the carrier's points of error urged in its appeal. The carrier filed an appeal on the remaining issues rendered adverse to the carrier contending that the determinations were against the great weight and preponderance of the evidence and should be reversed. The appeals file contains no response from the claimant to the carrier's appeal.

DECISION

Affirmed.

The claimant testified that he had worked for the employer since 1961 and in 1989 he filed a workers' compensation claim for an injury to his lungs due to exposure to chemicals and dust. The Industrial Accident Board ordered the carrier covering the claim to pay medical bills but ruled that the claimant had failed to establish permanent partial disability, permanent loss of wage earning capacity, or that he had compensable lost time. The claimant stated that he continued to work for the employer through _____, and that prior to this date a new product which he called "impregnated wood" was delivered and placed throughout the plant. The claimant admitted that prior to the "impregnated wood" being used in the plant he continued "to have a bit of a problem" with his lungs, but contended that fumes from the chemicals in the "impregnated wood" made him sick and aggravated his lung condition, causing him to have reactive airway disease.

The claimant asserted he knew on _____, that his injury was work-related. He claimed he told the employer about the injury within 30 days of _____, but did not offer a date. He also admitted to having conversations with doctors in 1992, 1993, and 1994 concerning problems with his lungs. The claimant was questioned about whether he talked to doctors about problems at work and exposure to "chemicals or dust or fumes or things like that" to which the claimant acknowledged that the conversations had indeed taken place but that he could not get treatment.

The claimant admitted that he sought treatment for airway irritation from exhaust fumes at work on May 12, 1992, which caused him to be nauseous and that he saw Dr. B on May 16, 1991, for an evaluation because of exposure to solvents and urethane. The claimant complained of burning in his chest and that he suspected the problem was partially related to the exposure. The claimant stated that he tried to have his medical treatment at this time covered under workers' compensation, but it was not accepted at the hospital so he put it under his personal health coverage. The claimant stated that he had been treated since 1979 for the lung problems and that he was finally transferred to different positions at work in 1991 and 1992 to get him out of areas where chemicals were used so that he would have better ventilation. He related that once he was moved to the other areas he did better, but started having problems again sometime in 1995.

The claimant explained that Dr. A met with him prior to September 19, 1995, and told him that his condition had worsened. Dr. A stated that he would contact the employer to let them know that he (the claimant) could no longer work in the plant without a respirator. Dr. A sent a letter to this effect to the employer on September 19, 1995. The claimant stated that he continued to work but was constantly back and forth to the doctor in 1995 and was hospitalized several times for various ailments including breathing problems through December 1996 for which he used his group health insurance.

The claimant testified that he was terminated from employment on January 8, 1997. He had not yet been released from the December hospitalization and after his release he approached his supervisor to discuss his job but his supervisor would not rehire him. The claimant has not returned to work since this date, and, in order to obtain medical treatment he has been going through Medicare for payment of medical bills. He has not sought employment from any other employer. The claimant explained that he tried to obtain medical treatment as a workers' compensation injury but the health care providers would not provide service through this venue. The claimant filed a claim for compensation on April 9, 1997, asserting a date of injury as June 1, 1996, up to and through a benefit review conference, but at the CCH he amended the date of injury to _____.

Dr. G testified that he was requested to perform a peer review for which he prepared a report dated September 20, 2000. Dr. G related that he reviewed pulmonary function tests dating back to 1979 and that the claimant's condition was stable from January 1987 through September 1995 without any change that could be attributed to workplace conditions. He noted that the claimant was hospitalized in December 1996 for rheumatoid arthritis and fluid around his heart (pericarditis). Dr. G noted a pulmonary function test taken in May 1997 indicated that the claimant's pulmonary capacity had sharply decreased since the September 1995 test. He stated that within reasonable medical probability the drop-off in pulmonary function was a consequence of the connective tissue breakdown from the rheumatoid arthritis and heart problems rather than from chemical exposure. Dr. G stated that he reviewed a test performed in January 1994 and one in September 1995 and there was no change during this period of time. He testified that he did not have any tests from 1996 and he believed that the claimant would not be able to work in the capacity that he worked prior to 1997 but that he could work in a light duty capacity.

The extensive report from Dr. G contained summaries of the findings of other doctors through the years, specifically that on May 16, 1991, the claimant was evaluated by Dr. K, who opined that the claimant's "symptoms were compatible with his exposure as urethane and solvents are very capable of producing bronchiole irritation" and Dr. K concluded that the claimant had mild airway dysfunction. Dr. G. also notes that the claimant received treatment from Dr. L in November 1991 with a follow-up on May 12, 1992. Dr. L's impression was airflow obstruction exacerbated by fume exposure at work. The claimant was again seen by Dr. L on January 7, 1993, for the same complaints. Dr. G concluded that from the period of 1979 to the end of 1995 the claimant had a mild component of small airway disease with obstruction of airflow that it was "quite likely that his exposure to work was a contributing factor if not the sole cause of his mild airway obstruction." However, there was a major drop in pulmonary function between late 1995 and the early part of 1997 which correlated with the claimant's hospitalizations for seronegative rheumatoid arthritis with questionable lupus and pericarditis with a pericardial effusion. He opined that it was more than likely that this sudden drop-off in pulmonary function was due to a consequence of connective tissue disease and that rheumatoid arthritis commonly has lung involvement resulting in a restrictive, obstructive or combined restrictive/obstructive pattern on pulmonary function testing. He opined that "within a reasonable degree of medical certainty, [the claimant's] initial decrease in pulmonary function was the result of his exposure to workplace chemicals, however, the further decrease in pulmonary function from 1995 to 1997 does not appear to be work related. Instead this is related to his connective tissue disease."

The claimant offered various absent notices beginning June 21, 1995, for days missed from work. The documents do not reflect the basis for missing work except for feeling ill or attending medical appointments. A notice dated July 8, 1996, reflects that the claimant was to have heart "balloon" surgery and had been hospitalized. Another notice dated November 21, 1996, reflects that the claimant was seen in the cardiology clinic.

A progress note from Dr. A dated June 21, 1995, reflects that the claimant presented with "hyper reactive [sic] airways disease. Continues to have a problem. Still working at same job. Being exposed to fumes of treated wood. Appears depressed and cries easily." Upon examination the lungs were clear. The claimant was referred for a psychological consult.

A progress note from Dr. W dated June 23, 1995, reflects that the claimant presented for a psychological consult upon referral from Dr. A. According to the report, the claimant related a 25-year history of occupational exposure to chemicals which the claimant believed caused his psychological problems and depression. Dr. W noted a history of reactive airways disease. The claimant was diagnosed with depression and reactive airways disease.

The claimant also offered a letter written to Mr. C, the supervisor for the claimant, from Dr. A dated September 19, 1995, in which he advised Mr. C that the claimant had hyperreactive airways disease and mild chronic obstructive pulmonary disease for which

he had been instructed to avoid exposure to irritant fumes, chemicals, and dust. Dr. A requested that the claimant be provided with a respirator or a work environment free of dust and fumes.

A letter dated July 29, 1996, from Dr. Gu, contains a statement from Dr. Gu that the claimant has “a known case of chronic lung problems mainly because of bronchospasms initiated by fumes or chemicals from work” which had been diagnosed one year ago. Dr. Gu stated that the claimant had undergone a stress thallium test which did not show any evidence of ischemic heart disease. Dr. Gu opined that the claimant’s main problem was respiratory in nature.

The claimant was hospitalized for bilateral rheumatoid arthritis in his knees and shoulders on December 1, 1996. The admitting physician noted a past medical history significant for a myocardial infarction in July 1996, depression, and reactive airways disease. The claimant was hospitalized on December 23, 1996, for klebsiella pneumonia, pericardial effusion secondary to his rheumatoid arthritis, and pancreatitis. He was discharged on December 30, 1996. The claimant was again hospitalized on January 2, 1997, where he was diagnosed with systemic lupus erythematosus complicated by pericarditis and arthritis. The claimant was noted to be in congestive heart failure which was controlled by diuretics. Secondary diagnoses were gastritis secondary to helicobacter pylori. The claimant was discharged on January 9, 1997. Dr. S in his letter of January 31, 1997, indicated that the claimant was disabled in regards to future employment until further notice and that the duration of the disability was undetermined at that time.

By letter dated July 8, 1997, Dr. C performed a peer review of the claimant’s chest problems. His report cites the various illnesses and diseases described in the reports of other physicians over the years and he noted that the claimant had a history of chronic obstructive pulmonary disease. He noted a report dated December 20, 1993, dealing with respiratory problems due to possible exposure of chemicals including formaldehyde, methyl methacrylate, epoxy, paints, solvents, and possible isocyanites although he was not provided any report referencing exactly what the claimant was exposed to and at what levels the exposure occurred. Dr. C noted that the claimant had made complaints for many years and he had medical records dating back to March 1987 reflecting medical treatment for the condition. He opined that the claimant’s current complaints “more appropriately appears to be predominantly related to the cardiovascular system or the heart and pericarditis as compared to the pulmonary system.”

By letter dated May 4, 2000, written to the Texas Workers’ Compensation Commission to elicit support for the payment of medical service, Dr. P related that the claimant had been treating with the (clinic) for ongoing problems with lung disease. He wrote, “[t]his disease has been established as being occupationally related arising out of his employment for [the employer].” Dr. P related an employment history for the claimant initiating in 1961 describing the various positions held by the claimant during his tenure with the employer which subjected him to wood dust and other particulate matter as well as to various chemicals including urethane and acetate. Dr. P noted that the claimant had been

removed from one position in 1986 due to these health problems and that in 1988 a workers' compensation claim was settled in favor of the claimant as to causation but because the claimant had continued to work, he was not entitled to receive indemnity benefits. Dr. P stated that in 1996 the claimant continued to have an exacerbation of his lung problems which were deemed to be caused by fumes and chemicals at work. "He received a letter from his internist and cardiologist which he provided to his employer at the end of 7/96 that specifically stated that [the claimant] had hyperactive airway disease, and that the earlier recommendation of a dust free environment had not been effectuated by the employer." Dr. P concluded with "I believe that the review will reveal that the carrier has not complied with the statutory requirement of providing lifetime medical benefits for the compensable condition."

Section 409.001(a) provides that, if the injury is an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the court stated that to fulfill the purpose of the notice provision, that is, to allow the insurer an opportunity to investigate the facts, the employer need only know the general nature of the injury and the fact that it is job-related. Although the evidence as to the date of injury and timely notice was extremely limited, the hearing officer could have believed that the claimant's statement that he had an injury on _____, and gave notice of his injury to the employer within 30 days of this date was credible. In any event, we will affirm the hearing officer's decision on any theory reasonably supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 401.011(26). The injured employee has the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The definition of "injury" includes occupational diseases. An occupational disease is defined as "a disease arising out of and in the course and scope of employment that causes damage or harm to the physical structure of the body," but does not include "an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34).

In Texas Workers' Compensation Commission Appeal No. 950125, decided March 10, 1995, the Appeals Panel noted that whether a claimant sustained a new injury or merely suffered a continuation of an original injury is normally a question of fact to be determined by the hearing officer; that we had held that, to be considered a new injury, there must be evidence that an injury as defined in the 1989 Act had occurred; that an aggravation of a previous condition or injury could rise to the level of a new injury, but that to be compensable there must be a new injury and not merely a transient increase in pain

from an existing condition. What must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury.

To establish that he has an occupational disease, the claimant's evidence must show a causal connection between the employment and the disease. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Because causation in this case was not a matter within common knowledge or experience, the claimant was required to prove causation by expert evidence to a reasonable degree of medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

In the present case the claimant presented scientific evidence of causation. The carrier presented contrary evidence. The hearing officer found that the claimant did not sustain any new injury or aggravation of the previous injury due to harmful exposure in the workplace. Resolving the conflict in the evidence was the province of the hearing officer. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We conclude that the challenged determination was not so against the great weight and preponderance of the evidence as to be wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant asserted that he had disability and had not returned to work after he was fired on January 8, 1997. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id.* Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury in the form of an occupational disease, the claimant cannot have disability.

Regarding the election-of-remedies issue, the Appeals Panel has generally cited the Texas Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), as establishing the standard. In Bocanegra the court stated that the election-of-remedies doctrine may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice. The carrier had the burden of proving an effective election of remedies, and whether an election has been made is generally a question of fact for the hearing officer to decide. In this case, the hearing officer found that the claimant used his group insurance and Medicare based on

his understanding that workers' compensation remedies were unavailable to him for this claim. The mere acceptance of other health benefits is normally not sufficient, in itself, to establish an election of remedies. Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999. Consequently, we affirm the hearing officer's decision on the election-of-remedies issue.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Judy L. Stephens
Appeals Judge